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1951

# Joseph M. Perkins, Esther J. Perkins v. Richard L. Spencer, Grace N. Spencer : Brief of Defendants and Respondents

Utah Supreme Court

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Peter M. Lowe; Richard M. Taylor; Attorneys for Plaintiffs;

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**In the Supreme Court of the  
State of Utah**

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**JOSEPH M. PERKINS and  
ESTHER J. PERKINS,**  
Plaintiffs and Appellants,

vs.

**RICHARD L. SPENCER and  
GRACE N. SPENCER,**  
Defendants and Respondents.

**CASE  
NO. 7565**

**FILED**  
JAN 15 1951

Clerk, Supreme Court, Utah

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**Brief of Defendants and Respondents**

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Appeal from Fourth Judicial District Court of the State  
of Utah, Hon. W. Stanley Dunford, Judge.

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**HUGH VERN WENTZ,**  
Attorney for Defendants  
and Respondents

**PETER M. LOWE,  
RICHARD M. TAYLOR,**  
Attorneys for Plaintiffs  
and Appellants

## **POINTS OF ARGUMENT**

### **Point I:**

**DID THE TRIAL COURT ERR IN ASSESSING \$532.50 DAMAGE BY REASON OF THE UNLAWFUL DETAINER OF THE SAID ESTHER J. PERKINS AND IN HOLDING THE PLAINTIFF, ESTHER J. PERKINS, GUILTY OF UNLAWFUL DETAINER?**

### **Point II:**

**DID THE TRIAL COURT ERR IN HOLDING THE FORFEITURE PROVISION OF THE CONTRACT WAS NOT A PENALTY?**

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# In the Supreme Court of the State of Utah

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JOSEPH M. PERKINS and  
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Plaintiffs and Appellants,

vs.

RICHARD L. SPENCER and  
GRACE N. SPENCER,  
Defendants and Respondents.

CASE  
NO. 7565

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## BRIEF OF RESPONDENTS

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### STATEMENT OF FACTS

To plaintiffs' and appellants' Statement of Facts should be added the following additional statement:

The contract attached Exhibit "A" carries the following provision:

"THIS AGREEMENT, made in duplicate this 18th day of May, A.D., 1949, by and between Richard L. Spencer and Grace N. Spencer, his wife, hereinafter designated as the Seller, and Joseph M. Perkins and Esther J. Perkins, his wife, as joint tenants according to the rules of the common law and not as tenants in common, and to the survivor of such, hereinafter designated as the Buyer, of Provo, Utah . . . ."

The contract attached Exhibit "A" is signed by Richard L. Spencer, Grace N. Spencer, as sellers, and Joseph M. Perkins and Esther J. Perkins as buyers.

The contract attached Exhibit "A" carries the following provision:

"It is understood between the parties, however, that the entire balance shall become due and payable when the home presently owned by Joseph M. Perkins and Esther J. Perkins, his wife, located in Bountiful, Utah, is sold."

The property sold under the contract constituted the home of defendants and respondents, and at the time of the negotiations and the making of the contract, the defendants and respondents occupied the premises as their home. The plaintiffs and appellants knew of this fact and understood that the defendants and respondents would have to procure another home for themselves. The defendants and respondents purchased another home and made a payment of \$5,619.67 and assumed a first mortgage indebtedness in the amount of \$4,376.83, payable at the rate of \$47.50 per month. They moved from the property in question to their new purchase on or about June 1, 1949. (Memorandum Decision, Pages 1 and 2).

The last payment made by the plaintiffs and appellants was on date of August 25, 1949, and the Bountiful property was sold about September 17, 1949. The plaintiffs' and appellants' application for an F. H. A. loan through the First Security Bank of Provo had been accepted so that as of the date when the sale was to have been consummated, the plaintiffs and appellants, by virtue of what had been paid in and what had been received by the sale of the Bountiful property and the approved F. H. A. loan, had an amount

more than sufficient to satisfy the demands of the contract, but plaintiffs and appellants failed to make any payment to the defendants and respondents after the sale of the Bountiful property, nor did they vacate the property. (Memorandum Decision, Pages 2 and 3).

The notice of November 3, 1949, was served on both of the plaintiffs and appellants and notified them that they were delinquent upon their contract in the amount of the balance due of \$7,940.10, and that unless they paid the delinquency within five days, "the undersigned, in accordance with the terms and conditions of said contract, shall be released from all obligations in law and equity, to convey the said property, and all payments which have been made by you heretofore on said contract to the undersigned, shall be forfeited to the undersigned as liquidated damages for the non-performance of the said contract and you will thereupon become forthwith tenants at will of the undersigned and action will be commenced against you for recovery of the immediate possession of said premises." (Memorandum Decision, Page 3).

That at the time of the service of the notice of November 9, 1949, upon Esther J. Perkins, the plaintiff, Joseph M. Perkins, was not at home, but was working in Carbon County. (Memorandum Decision, Page 4).

### ARGUMENT

Counsel for plaintiffs and appellants, in their brief, has set up under the heading of "Plaintiffs' Points," (page 4 of Appellants' Brief), two principal grounds. The issues raised by the statements of plaintiffs' and appellants' points are as follows:

**Point I**

Did the trial court err in assessing \$532.50 damages by reason of the unlawful detainer of the said Esther J. Perkins and in holding the plaintiff, Esther J. Perkins, guilty of unlawful detainer?

**Point II**

Did the trial court err in holding the forfeiture provision of the contract was not a penalty?

**POINT I**

DID THE TRIAL COURT ERR IN ASSESSING \$532.50 DAMAGE BY REASON OF THE UNLAWFUL DETAINER OF THE SAID ESTHER J. PERKINS AND IN HOLDING THE PLAINTIFF, ESTHER J. PERKINS, GUILTY OF UNLAWFUL DETAINER?

Counsel for plaintiffs and appellants assumes that the only tenant is Joseph M. Perkins and from this, reasons that the only one who could be guilty of unlawful detainer would be Joseph M. Perkins. The point is overlooked that Esther J. Perkins was also a tenant at will and that she was properly notified to vacate the premises and the judgment is for damages as to her unlawful detainer. The question here is not that of damages as against Joseph M. Perkins, but is a question of damages as to tenant Esther J. Perkins.

The contract runs in favor of Joseph M. Perkins and Esther J. Perkins and is signed by Joseph M. Perkins and Esther J. Perkins as buyers. (See Contract, Exhibit "A").

48 Corpus Juris Secundum, page 927, paragraph 4, contains the following statement:



"A joint tenancy may be terminated or severed by any act which destroys one or more of its unities. Thus a joint tenancy may be severed by the act of one or less than all of the co-tenants in conveying or otherwise disposing of their interests, as this destroys the unity of title and creates a severance as to such interests, as where one joint tenant assigns, mortgages or pledges, or leases his interest."

Swartzbaugh v. Sampson, 54 P2d 73, 11 Cal. App. 2d, 451 states:

"An estate in joint tenancy can be severed by destroying one or more of the necessary unities, either by operation of law, by death, by voluntary or certain involuntary acts of the joint tenants, or by certain acts or omissions of one joint tenant without the consent of the other."

Here the two tenants had violated the provisions of their contract and had been notified that their rights under the contract were forfeited and that henceforth they would be treated as tenants at will.

The notice that was later served on Esther J. Perkins, demanding possession of the premises, did, after the lapse of the five-day period, serve to sever the tenancy and it would seem to follow that when Esther J. Perkins remained in possession, that an action for unlawful detainer against her would be good even though such an action might not lie as against other persons.

Counsel for plaintiffs and appellants argues that the failure of tenant, Esther J. Perkins, to move out of the house did not cause the Spencers any damage. The facts show that Esther J. Perkins was in actual possession and that plaintiff, Joseph M. Perkins, was not at home, but

was working in another county. The argument assumes that Joseph M. Perkins was staying in possession, but actually he was in another county.

32 American Jurisprudence, page 778, paragraph 918, contains the following language:

"Since a tenant is under duty, it being a covenant express or implied in all leases, to deliver up the premises to the landlord on the termination of a lease, the tenant can hold over rightfully only pursuant to a valid agreement with the landlord. Holding over by the tenant without such agreement of the landlord puts the tenant in the position of being in wrongful possession against the landlord. He is a wrongdoer."

The tenant, Esther J. Perkins, by her holding possession after the lapse of the time set forth in the notice of November 9, 1949, is a wrongdoer. Her liability for damages as a result of her wrongful act is not affected by the fact that there may be other wrongdoers. As far as is apparent to the defendants and respondents, she is the only one in physical possession. Certainly, it can be assumed that as soon as Esther J. Perkins was ousted from possession, her joint tenant would have no desire to remain in possession, especially when he was not physically present.

The measure of damages set out by *Forrester v. Cook*, 292 P. 206, 77 Utah 137, is the rental value of the land, not as rent, but as damages which, under the unlawful detainer statute, is multiplied by three. Esther J. Perkins, by virtue of her interest in the contract and her retention of possession after due and proper notice, is an unlawful detainer and it would seem to follow that the application of the unlawful detainer statute, U. C. A., 1943, Title 104-

60-13, and the principles set out in *Forrester v. Cook*, 292 P. 206, 77 Utah 137, would require a finding of damages in the amount of \$532.50 as against Esther J. Perkins.

## POINT II

DID THE TRIAL COURT ERR IN HOLDING THE FORFEITURE PROVISION OF THE CONTRACT WAS NOT A PENALTY?

The Courts, in determining whether a provision in a contract is one calling for damages or a penalty, have reasoned on the basis set out in the following statements of the law:

Pomeroy's *Equity Jurisprudence*, Vol. 1, page 819, Section 440, answers the query as follows:

"The question whether a sum thus stipulated to be paid is a penalty or is liquidated damages, is often difficult to determine. It depends, however, upon a construction of the whole instrument, upon the real intention of the parties as ascertained from all the language which they have used, from the nature of the act to be performed or not to be performed, from the consequences which naturally result from a violation of the contract, and from the circumstances generally surrounding the transaction."

Williston on Contracts, Revised Edition, Vol. 3, Sec. 777, page 2185-6, on question of intention, states:

"Probably all that most Courts mean—at any rate all that can be defended—is to say that the validity of the stipulation is to be 'judged of as at the time of making of the contract, not as at the time of the breach,' and this is undoubtedly true."

Williston on Contracts, Revised Edition, Vol. 3, Sec. 783, page 2203-4, notes:

"Though the mere fact that, as it turns out, the sum named exceeds the actual damage will not make it a penalty, since the reasonableness of the provision must be considered as of the date of the contract..."

Pomeroy's Equity Jurisprudence, Vol. 1, Sec. 385, page 714, states:

"The meaning is that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the Court will not confer its equitable relief upon the parties seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for all the equitable rights, claims and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy."

A consideration of the cases, including those relied on by counsel for the plaintiffs and appellants, indicates that what we have here is a damage provision and not one for a penalty.

Counsel for plaintiffs and appellants, in an effort to sustain Point Two, relies in the main on the cases of *Dopp v. Richards*, 43 U. 332, 135 P. 98, *Western Macaroni Mfg. v. Fiore*, 47 U. 108, 151 P. 984, *Cooley v. Call*, \_\_\_\_ U. \_\_\_\_, 211 P. 977, and *Croft v. Jensen*, 86 U. 13, 40 P2d 198.

A reading of the case of *Dopp v. Richards*, 43 U. 332, 135 P. 98, shows facts which are in no way applicable to the facts in the present case. Plaintiff, in that case, sought to recover damages commensurate with his claimed loss in addition to the payments that had actually been made,

notwithstanding the provision in the contract providing that the vendees should forfeit to the vendors as liquidated damages, all payments that had been made on the agreement. The Utah Supreme Court, in that case, held that the provision for liquidated damages of the amounts paid limited any recovery which plaintiff might have to amounts actually paid, even though it might be far less than the actual damages.

Counsel for plaintiffs and appellants places considerable reliance on the case of *Western Macaroni Mfg. v. Fiore*, 47 U. 108, 151 P. 984. We submit that the principles set out in this case have no application to the instant case. In the *Western Macaroni Mfg. v. Fiore* case, the covenants were of equal importance and covered unrelated subject matter. There are numerous cases dealing with the type of contract that we have in the instant case, but in none of these cases does the Court apply the reasoning of the *Western Macaroni* case. The *Cooley v. Call*, \_\_\_U.\_\_\_, 211 P. 977, case involved a contract containing different covenants. In fact, one of the covenants in the *Cooley v. Call* case was for the payment of taxes and assessments, and one for payments on purchase price, just as two of the covenants in the instant case are to pay taxes and assessments and payments on purchase price. The Court in the *Cooley v. Call* case reasoned that the intent of the parties was that the provision was one for liquidated damages. We submit the same reasoning would apply here. In the instant case, the paramount covenant is one of payment. The different covenants referred to by the buyer all tie in to the main covenant of payment.

The principal is well stated in Pomeroy's Equity Jurisprudence, Volume 1, in the note under Section 443, at pages 842 and 843 as follows:

"The mere fact, however, that an agreement contains two or more provisions differing in kind and importance does not of itself necessarily bring it within the operation of this rule. If the various acts stipulated to be done are but minor parts of one single whole—steps in the accomplishment of one single end—so that the contract is in reality one, then it may properly come under the operation of the second rule as given in the text."

The second rule as given in the text is found in Pomeroy's Equity Jurisprudence, Volume 1, Section 442 at page 829:

"Second. Where an agreement is for the performance or non-performance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such purpose will be treated as one for liquidated damages unless the intent be clear that it was designed to be only a penalty."

In the case of *Cooley v. Call*, \_\_\_U.\_\_\_, 211 P. 977, the contract price was \$8,450.00, payable as follows: \$1,850.00 upon execution of the contract; \$1,000.00 December 1, 1920; \$1,000.00 December 1, 1921, and the assumption of two mortgages aggregating \$4,600.00, and agreement to pay taxes thereafter levied. The Court found that the buyers had paid \$2,130.00, or approximately 25.2% of the purchase price. The action, in that case, was brought

by the sellers of the land, seeking specific performance of the contract. The Court held that the forfeiture provision was intended by the parties as one for liquidated damages and so denied the right of the owners to specific performance.

We submit that on the basis of the test used in the case of *Cooley v. Call*, \_\_\_U.\_\_\_, 211 P. 977, the percent of payment is approximately the same as in our instant case, and that the reasoning of the Court as to the length of time before final payment would be made, would apply with equal force in the instant case.

In the instant case, the time of the final payment was indefinite, in that it was to be paid when the Bountiful property was sold. It could be years before this payment would have been due so that the Court could very well find that the provision as to liquidated damages was certainly intended by the parties as liquidated damages.

There is another fact in the instant case that does not appear in the *Cooley v. Call* case, and that is that it was known to the plaintiffs and appellants, as buyers, that the defendants and respondents would have to procure another home for themselves before the plaintiffs and appellants could take possession. In order to obtain a home for themselves, the defendants and respondents purchased property by paying \$5,619.67 and by assuming a first mortgage indebtedness upon the property in the sum of \$4,376.83, payable at the rate of \$47.50 per month. They moved from the property in question to their new purchase on or about June 1, 1949. In other words, the defendants and respondents gave up the home they were living in, obligated themselves on a contract and assumed a further mortgage obligation. They did not contemplate being placed in a

landlord-tenant relationship at the time of the execution of the contract, so that it can be said in this case, as the Supreme Court said in the Cooley v. Call case, that the obvious intention of the parties, considered in the light of what the parties must have foreseen and contemplated at the time the contract was executed, was that the provision was one for liquidated damages.

The facts in the case of Croft v. Jensen, 86 U. 13, 40 P2d 198, are clearly inapplicable to the facts in the instant case. The sale price of the property involved in the Croft v. Jensen case was \$6,500.00. A down payment was made of \$4,200.00, represented by \$200.0 cash and property conveyed to vendor valued at \$4,000.00. The contract contained a clause similar to the clause in the present case. The facts of that case disclose that on July 17, 1925, the plaintiffs served a written notice on the defendant, Jensen, informing him that plaintiffs had terminated the contract for the sale of the property. A similar notice was sent by registered mail on the same day to defendant I. G. Bench. The sum of \$200.00 remained unpaid at the time. A few days after the notice was given I. G. Bench, he tendered to the plaintiffs and the plaintiffs' attorney the sum of \$200.00 and demanded a deed to the property. The tender of the payment of \$200.00 was refused.

The facts further show that at the trial the defendant again tendered the balance in the amount of \$200.00. The Utah Supreme Court, in the case of Croft v. Jensen, made this observation:

"It will be observed that at the time the plaintiff attempted to declare a forfeiture, she had been paid the whole of the purchase price of the property except \$200.00, which sum was tendered to her and was by



her refused prior to the time she commenced this action." (Bottom of page 201 and top of page 202, 40 P2d 198)

The Court further observed:

"To permit plaintiff to retain \$6,300.00 as liquidated damages because she was not promptly paid two installments when there was only \$200.00 remaining unpaid on the contract, is not in accord with equity and good conscience, but is clearly unconscionable." (Bottom of page 202 under Sub-head 3, 40 P2d 198)

The facts in the instant case are not at all similar to the Croft v. Jensen case. In the instant case, plaintiffs and appellants paid the down payment of \$2,500.00 and three of the \$75.00 per month installments, making a total paid by them of \$2,725.00, or approximately 25.9% of the purchase price. At the time of the execution of the contract, the amount paid down was 23.8% of the purchase price. In the Croft v. Jensen case, the amount paid in at the time of the forfeiture, was in excess of 96% and the amount paid at the time of the execution of the contract was 64.4% of the purchase price.

In the case now before the Court, there is no evidence that there was ever a tender of payment made by the buyers. In the Croft v. Jensen case, tender of payment was made repeatedly. Further, in the instant case, the facts show that the sellers, the respondents herein, in their notice of November 3, 1949, gave the buyers an opportunity to pay the delinquency within five days. Payment was not made. In the Croft v. Jensen case, there was never any offer permitting the buyers to pay up the delinquency.

The Courts quite frequently, as the Court did in the Croft v. Jensen case, state that whether an agreement is for liquidated damages or for penalty must be determined by a consideration of the circumstances surrounding the parties at the time of its execution. However, it is submitted that the Court in its decision in the Croft v. Jensen case, based its decision on the lack of equity in the case as shown by the Court's statement as follows:

"To permit plaintiff to retain \$6,300.00 as liquidated damages because she was not promptly paid two installments when there was only \$200.00 remaining unpaid on the contract, is not in accord with equity and good conscience, but is clearly unconscionable."  
(Bottom of page 202 under Sub-head 3, 40 P2d 198)

In the case of Franz v. Hair, 76 U. 281, 289 P. 130, the down payment on the purchase price was in excess of 30%. The Court did not treat it as a penalty. In the instant case, payment made was approximately 25.9% and the buyer was in possession of the premises for eight months, the last five months of which no payment was made.

The reasoning of the Croft v. Jensen case was followed in Rayfield v. Van Meter, 52 P. 666, an action to replevy furniture sold to defendant. Sale price, \$1830.00; \$1,000.00 down payment, balance \$850.00 not paid. Claim of fraud. The Court said: (See page 667, 52 P. 666)

"It is contended that in equity the defendant should recover the sum paid less a proper compensation for the use had by him of the goods. But the grounds for equitable relief against the contract pleaded by the defendant were found against him by the Court and he stands in the position of one who wilfully refused

to comply with his agreement. It seems to us that there is little equity and certainly no sound policy in allowing a buyer, under such circumstances, to be at pleasure to quit his contract with no other liability than such as the law would have implied had there been no express contract at all."

In the instant case, defendants and respondents never interfered with the contract. Plaintiffs and appellants quit. There was nothing in the agreement that was harsh. The price was fair. Plaintiffs and appellants occupied the premises for eight months, the last five without making any payments. Payment has not been tendered and this is so even after plaintiffs and appellants were given an opportunity to make payment. No payment was made even after the Bountiful property was sold. Defendants and respondents, in reliance on sale, purchased other property and obligated themselves.

From the foregoing facts, in the instant case the equities certainly seem to be with the defendants and respondents.

We respectfully submit that under the principles set forth in the cases adjudicated by the Utah Supreme Court and other courts, the trial court did not err:

(1) In assessing \$532.50 damages by reason of the unlawful detainer of the said Esther J. Perkins and in holding the plaintiff Esther J. Perkins guilty of unlawful detainer; and

(2) In holding the forfeiture provision of the contract was not a penalty.

Respectfully submitted,

HUGH VERN WENTZ,

Attorney for Defendants  
and Respondents